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Mesa, AZ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMERIFIRST FINANCIAL, INC.,

and

Case 28-CA-156620

KELLI GONZALEZ

DECISION, ORDER, AND NOTICE TO SHOW CAUSE

On October 30, 2015, the General Counsel, through the Regional Director for Region 28, issued a complaint alleging that the Respondent has been violating Section 8(a)(1) of the National Labor Relations Act by maintaining certain work rules in documents entitled “Operations Staff Terms of Employment Agreement” (the Agreement) and “Employee Handbook” (the Handbook). The complaint also alleges that the Respondent has violated Section 8(a)(1) by maintaining a mandatory dispute resolution policy in the Agreement and the Handbook. On January 15, 2016, the parties filed a joint motion to waive a hearing and a decision by an administrative law judge and to transfer this proceeding to the Board for a decision based on a stipulated record. On March 8, 2016, the Board issued an Order Approving Stipulation, Granting Motion, and Transferring Proceeding to the Board. Pursuant to that Order, the Board transferred the case to the Board for the purpose of issuing findings of fact, conclusions of law, and a Decision and Order, and set a briefing schedule. The parties thereafter filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

1. In support of the complaint's allegation that the Respondent unlawfully maintained a mandatory dispute resolution policy in the Agreement and the Handbook, the General Counsel relies on the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), holding that the maintenance and enforcement of an arbitration agreement requiring employees to waive the right to commence or participate in class or collective actions in all forums, whether arbitral or judicial, violates Section 8(a)(1) of the Act.

Recently, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. *Id.* at ___, 138 S. Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. *Id.* at ___, 138 S. Ct. at 1619, 1632. In light of the Supreme Court's decision in *Epic Systems*, which overrules the Board's holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the arbitration agreement is unlawful based on *Murphy Oil* must be dismissed.

2. In support of the complaint's allegations that the Respondent unlawfully maintained the disputed work rules in the Agreement and the Handbook, the General Counsel relies on the "reasonably construe" prong of the Board's decision in *Lutheran Heritage Village-Livonia*, 343

NLRB 646 (2004) (*Lutheran Heritage*). Recently, the Board overruled the *Lutheran Heritage* “reasonably construe” test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017). Accordingly, we sever and retain these complaint allegations, and we issue below a notice to show cause why they should not be remanded to the Regional Director for further proceedings in light of *Boeing*.

ORDER

The complaint allegation that the maintenance of the mandatory dispute resolution policy in the Agreement and the Handbook unlawfully restricts employees’ statutory rights to pursue class or collective actions is dismissed.

Further,

NOTICE IS GIVEN that any party seeking to show cause why the issue whether the remaining complaint allegations should not be remanded to the Regional Director for Region 16 must do so in writing, filed with the Board in Washington, D.C., on or before October 11, 2018 (with affidavit of service on the parties to this proceeding). Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C., September 27, 2018.

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD